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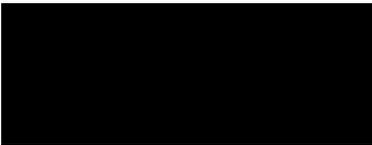


FILE: WAC-03-028-55466 Office: CALIFORNIA SERVICE CENTER Date: MAY 18 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner sells clothing, footwear, and accessories. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$5.77 per hour, which amounts to \$12,001.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1972 and to currently employ 31 workers. In support of the petition, the petitioner submitted a partially illegible Form 1120, U.S. Corporation Income Tax Return, for 2001 and state quarterly wage reports for the first three quarters in 2002. The quarterly wage reports do not reflect that the petitioner employed or paid wages to the beneficiary for those quarters.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 2, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director sought a legible, signed, and complete tax return for 2001.

In response, counsel stated that a more legible copy of the petitioner's 2001 corporate tax return was unavailable because "severe supertyphoons" destroyed its records. Counsel also asserted that the petitioner's gross revenues,

depreciation, total assets, and total wages paid should be considered in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date. After discussing a series of typhoons, the Iraq War, terrorist threats against travelers, the SARS epidemic in Asia, and the petitioner's business locations temporarily closed for repairs due to rebuilding Guam's infrastructure, counsel cited to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and stated that "[t]he detrimental effects on the business community from Guam from the super-typhoon in December 2002 have passed, the economic downturn was a temporary aberration, and the demand for tailoring services is increasing." The petitioner submitted the same illegible copy of its corporate tax return for 2001, an unaudited financial statement, and news articles about a series of typhoons destroying Guam's infrastructure, and interrupting its tourism and commercial businesses.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on July 9, 2003, the director again requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director emphasized that he could not accept unaudited financial statements and requested evidence for 2002.

In response, the petitioner submitted its corporate tax return on Form 1120, for its fiscal year that began on October 1, 2001 and ended on September 30, 2002. The form has 2001 on its upper right corner, although counsel states the tax return is for the petitioner's 2002 fiscal year. The tax return submitted previously also has 2001 on its upper right corner, but clearly states that it covers the fiscal year beginning on October 1, 2000 and ending on September 30, 2001.

The tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$7,316	\$13,270
Current Assets	\$569,023	\$969,229
Current Liabilities	\$1,049,861	\$826,989
Net current assets	-\$480,838	\$142,240

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 24, 2003, denied the petition. The director noted that the petitioner established its ability to pay the proffered wage in 2002, but not 2001 based on the petitioner's low net income and negative net current assets. The director stated that no evidence was provided to illustrate that the petitioner's business was affected by the typhoons and that the "incident resulted in uncharacteristic financial results for the petitioner. Rather, the article submitted by the petitioner actually appears to indicate that typhoons are a recurring event in Guam."

On appeal, counsel asserts that the director unreasonably focused upon the petitioner's net income and net current assets in 2001, but instead should consider the beneficiary's ability to generate revenue, citing *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989); the U.S. Department of Labor's Bureau of Alien Labor

¹ Taxable income before NOL deduction and special deductions as reported on Line 28. The AAO notes that NOL is an abbreviation for net operating loss.

Certification Appeals (BALCA) case law on ability to pay²; *Matter of Sonogawa*, 12 I&N Dec. 612, for the premise that the director should consider the petitioner's financial standing in 2002 to ascertain the petitioner's reasonable expectations of its ability to pay; and the petitioner's monthly average cash-at-hand in fiscal year 2002, noting that the petitioner lost its bank records in fiscal year 2001. The petitioner submits copies of its checking account statements for October 2001 through September 2002.

At the outset, the unaudited financial statements that counsel submitted in response to the director's request for evidence are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, contrary to counsel's assertions. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

² Counsel cited to *Matter of Oriental Pearl Restaurant*, 92-INA-59 (BALCA Aug. 24, 1993) for the premise that a business reporting a \$30,000 loss could establish ability to pay.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, counsel's argument in response to the director's request for evidence that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of only \$7,316 and negative net current assets and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. In 2002, however, the petitioner's net income or net current assets, \$13,270 and \$142,240, respectively, are both amounts greater than the proffered wage of \$12,001.60 and illustrate the petitioner's ability to pay the proffered wage in that year.

Counsel asserts that the petitioner's financial situation in 2001 should be overlooked and the focus should be upon the petitioner's situation in 2002, and cites *Matter of Sonogawa*, 12 I&N Dec. at 612, for this premise. However, the regulation at 8 C.F.R. § 204.5(g)(2) clearly sets forth the requirement that the petitioner must illustrate its ability to pay the proffered wage at the date of its priority date, which in this case is 2001. *Sonogawa*, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

While counsel has asserted that typhoons temporarily interrupted the petitioner's business due to infrastructure problems, the AAO concurs with the director's determination that no independent, corroborating evidence was submitted to bolster this assertion. Clearly typhoons impacted Guam's business generally, but no evidence was submitted that shows that 2001, compared to 1999, 2000, and 2002, was an unprofitable year, or that the petitioner's business was temporarily closed or otherwise specifically adversely impacted by the typhoons. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Additionally, contrary to counsel's assertion, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an alteration tailor will significantly increase profits for a business involved in selling clothing at retail. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Finally, counsel states that DOL's BALCA case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Matter of Oriental Pearl Restaurant*, 92-INA-59 (BALCA Aug. 24, 1993), counsel states that this case stands for the proposition that a petitioner's reported losses on its tax returns should not overcome a determination that it has the ability to pay the proffered wage. Counsel does not state how DOL precedent is binding in these proceedings other than to assert that two separate agencies should approach the issue uniformly to avoid violating the petitioner's due process constitutional rights⁴. In the instant matter, the AAO cannot determine that the director violated the petitioner's due process rights since it provided the petitioner with two notices and opportunities to overcome deficiencies contained in the record of proceeding and clearly stated his reasoning for its denial. Additionally, the director followed established precedent, policy, and procedure established by CIS, Congress, and the federal court system.

⁴ The AAO reviewed the case holding in *Matter of Oriental Pearl Restaurant* and notes that the BALCA board considered numerous factors in its determination that the petitioning entity in that case could establish an ability to pay despite a reported loss in one year, that make the facts distinguishable from the instant petition, such as the following:

Oriental Pearl did not turn a profit in its first year, but it certainly generated a high volume of business and provided a highly attractive service in its community. . . . Oriental Pearl appears to be a substantial pillar in a special, thriving cultural center, doing a large volume of business there. The Atlanta "Insider's Guide" depicts Oriental Pearl as what seems to be an efficient, bustling, and very attractive restaurant.

Distinguishable from the facts in Oriental Pearl, the petitioner was not evaluated for because it did not submit evidence concerning its reputation or location in a thriving business area.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.